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No. [redacted]54

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1922.

MISSOURI PACIFIC RAILROAD CO.,
(Appellant Below) ..... Petitioner

vs.

R. L. HANNA (Appellee Below) ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT OF PETITION.

EDWARD J. WHITE,
THOMAS B. PRYOR,
Counsel for Petitioner.

American Printing Company, Fort Smith, Ark.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Missouri Pacific Railroad Company, in support of this, its application for writ of certiorari to be directed to the Supreme Court of Arkansas, respectfully shows:

That on the 5th day of March, 1923, a final judgment was duly entered by the Supreme Court of Arkansas affirming a judgment entered by the State Circuit Court of Poinsett County of the State of Arkansas, in a suit wherein R. L. Hanna was plaintiff, and the Missouri Pacific Railroad Company was defendant. Said suit was for damages on account of personal injuries received by said R. L. Hanna while riding on a pass on the railroad of the defendant, Missouri Pacific Railroad Company, in the State of Illinois. Suit was instituted for $2000.00, and judgment was rendered for that amount.

Petitioner files herewith a certified copy of the record in said cause, marked Exhibit "A."

Petitioner submits the following statement of facts setting up the question involved:

On January 1, 1921, the respondent, R. L. Hanna, shipped a car of live stock over the petitioner's railroad from Harrisburg, Arkansas, to National Stock Yards, Illinois. He accompanied said shipment as a caretaker, riding in the caboose. He was transported on a drover's pass, which contained the stipulations hereinafter set out. When the train reached the town of Gale, in the State of Illinois, the respondent undertook to alight from the caboose while the same was in motion, and in doing so fell and was injured.

He instituted suit in the Circuit Court of Poinsett County, Arkansas, to recover damages resulting from said injuries.

The respondent testified that the conductor in charge of the train upon which he was riding "advised" him to alight from the caboose while same was in motion, and that upon the advice of said conductor he did undertake to alight, and in consequence was injured.

Petitioner, in the trial court, introduced in evidence the drover's pass upon which respondent was riding. This pass was printed upon the bill of lading, and showed a signed acceptance by the respondent. Said pass contained the following stipulations, to-wit:

> "That the person or persons in charge of Live Stock covered by this contract, shall remain in the caboose car attached to the train, while same is in motion, or about to be put in motion, and that whenever such person or persons shall leave the caboose or pass over or along the cars, or track, they shall do so at their own risk or personal injury from every cause whatever, and that the said first party shall not be required to stop or start its train or caboose cars, from depots or platforms, or to furnish lights for the accommodation or safety of such persons. That the second party will hold the first party harmless from any and all claims for injuries to persons accompanying said Live Stock, as aforesaid, resulting from the first party's negligence or otherwise, and will

indemnify it for any damages and expenses it may be required to pay by reason thereof, or any expenses it may be put to, or damages it may be required to pay by reason of the introduction of said Live Stock into a country, or State, against the quarantine or other laws of the United States, or of any State, people or community."

And the further provision, to-wit:

"No agent of this carrier has any authority to waive, modify, or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do."

And the further provision:

"The party or parties in charge of this stock shall and they hereby agree to observe the following regulations and identify themselves whenever required to do so by any conductor.

"1. Remain in the caboose attached to the train drawing said cars while the train is in motion.

"2. Get on and off said caboose while the same is still."

The trial judge refused an instruction to find for the defendant, and gave the following instruction:

"If you find from a preponderance of the evidence that upon approaching or while in or near the yards of the defendant at Gale, Illinois, the conductor in charge of said train of defendant advised the plaintiff to alight or get off of said train at the yard office, and if you further find that plaintiff acted upon the advice of said conductor and attempted to alight from said train, and that in attempting to alight from said train he was in the exercise of due care for his own safety, and if you further find that the plaintiff was injured in alighting

from said train and falling you will find for the plaintiff, and unless you find for the plaintiff under this instruction your verdict will be for the defendant."

There were other instructions given, but the same are not material on this petition.

The jury by its verdict settled the question of fact as to whether or not the conductor had advised the plaintiff to alight from the caboose. As to the contract of transportation introduced in evidence, no question was raised as to its authenticity or correctness, nor was there any contention that he was ignorant of its terms.

The Supreme Court of Arkansas, in disposing of this contention on the part of defendant said:

> "Appellant's main contention for reversal is that, according to the undisputed facts, appellee was injured while attempting to debark from a moving train, in violation of his contract for transportation. In support of this contention, appellant cites the case of Illinois Central Railrad Co. v. Jennings, 229 Ill. 608, which decided that such a stipulation was valid. Conceding that the liability is determinable by the law of the State where the injury occurred, and that the Supreme Court of Illinois has upheld the validity of such a clause in a transportation contract as being reasonable and just, the contract and adjudication upholding its validity have no bearing upon or application to the instant case. This suit is not for breach of contract. It is based upon the maxim "respondeat superior," which imputes liability to a master for the negligent acts of his servant, within the scope of the servant's actual or apparent authority, irrespective of any contract. R. C. L., Vol. 4, Sec. 596."

A petition for rehearing was filed in the Supreme Court of Arkansas, and it was urged upon the Court that under the Interstate Commerce Act of Congress a passenger riding upon a pass is bound by the provisions contained in the pass. The Supreme Court of Arkansas overruled the petition for rehearing, and adhered to its former decision that pas-

sengers riding upon a pass are not bound by the provisions contained in the pass, although said forms of passes are on file with the Interstate Commerce Commission as a part of its tariff.

Your petitioner contends that the Supreme Court of Arkansas erred in not reversing the judgment of the Circuit Court of Poinsett County, Arkansas, and that such error in the decision of the Supreme Court of Arkansas is in conflict with the Act of Congress known as the Interstate Commerce Act, approved February 4, 1887, as amended by the Act of June 29, 1906, and in conflict with the decisions of this Court construing said Act of Congress, and also in conflict with the decisions of the Supreme Court of Illinois in the case of Illinois Central Railroad Company v. Jennings, 229 Ill. 608, which decided that such a stipulation was valid and binding.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of Arkansas, commanding said Court to certify and send to this Court on a date certain, to be therein designated, a full and complete transcript of the record, and the proceedings of said Supreme Court in said cause, therein entitled "Missouri Pacific Railroad Company, Appellant, v. R. L. Hanna, Appellee," and Numbered in said Supreme Court of Arkansas 1810, to the end that said cause may be reviewed and determined by this Court, as provided by the provisions of the Act of Congress known as the Judicial Code, and by the amendments thereto, including that of September 6, 1916, and that this petitioner may have other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act of Congress, and that the judgment in said Supreme Court of Arkansas in said cause, and every part thereof, may be reversed by this Honorable Court.

EDWARD J. WHITE,
THOMAS B. PRYOR,
Counsel for Petitioner.

BRIEF

Petitioner submits that the Supreme Court of Arkansas erred in holding that the contract for transportation had no application to or bearing upon the question of its liability.

Petitioner shows that this Court has repeatedly considered stipulations of a similar nature as having bearing upon and applications to such cases. Drovers' passes are permitted under the same clause of the Interstate Commerce Act as are other passes, and, as to such other passes, this Court has not only considered such stipulations, but has sustained them as complete defenses.

K. C. S. Ry. Co. v. Van Zant, (Jan. 2, 1923).
Charleston Railway Co. v. Thompson, 234 U.S. 576.
Boering v. Chesapeake Beach R.R. Co., 193 U.S. 442.
Northern Pacific R.R. Co. v. Adams, 192 U.S. 440.

The Act of Congress itself provides:

> "No common carrier subject to the provisions of this Act shall, after January first, Nineteen Hundred and Seven, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers, except * * * * to necessary caretakers of live stock * * * * *."

And in the case of K. C. S. Ry. Co. v. Van Zant, *supra*, this Court said:

> "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of passes is necessary. We think, therefore, free passes in their entirety are taken charge of,—not only their permission and use, but the limitations and conditions upon their use. Or, to put it in another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of the responsibility the railroad incurs by their issuance, and the extent of the right the person to whom issued acquires,, are taken charge of."

And the Court further said, after referring to other cases:

> "Those cases were considered and applied as giving validity to the stipulations in passes issued under the Act in Charleston & W. C. R.R. Co. vs. Thompson, 234 U.S. 576, according thereby freedom of transportation to the possessors of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right and its incident obligations, and be a means of exacting from the company indefinite damages. * * * The pass proceeded from the Federal Act; it is controlled necessarily in its incidents and consequences by the Federal act, to the exclusion of state laws and state policies, and such is the effect of the cited cases."

The stipulations in such passes are to be tried according to the Act of Congress and the decisions of the Federal Court.

G. F. & A. Ry. Co. v. Blish Milling Co., 241 U.S. 190.
N. O. & N. E. R.R. v. Harris, 247 U.S. 367.
N. O. & N. E. R.R. v. Scarlett, 249 U.S. 528.
Charleston Ry. v. Thompson, 234 U.S. 576.

The pass for a caretaker of live stock, being included in the same clause of the Interstate Commerce Act as other permissible passes, is to be considered as a "free" pass within the meaning of the Act, and is to be governed according to the Act and the decisions of this Court.

This Court in Charleston & W. C. R.R. Co. v. Thompson, *supra*, referring to such passes said:

> "To most of those enumerated, the pass would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception, we think it plain that the statute contemplates a pass as gratuitous and in the same sense to all."

The transportation was interstate, and the stipulation was known to the respondent. In violating the stipulation

he was injured. The stipulation expressly provided that no agent had authority to alter, to change, or modify its terms.

The Supreme Court of Arkansas erred in holding that the stipulation was abrogated by the suggestion of the conductor of the train, and that the suit was not for "breach of the contract," but was based upon the maxim "respondeat superior," which imputes liability to a master for the negligent acts of his servant.

The Circuit Court of Appeals for the Eighth Circuit, in the case of Smith v. Atchison, Topeka & Santa Fe Railroad Co., 194 Fed. 79, where the facts were similar to the facts in this case said:

> "The contract is by its terms tied to the tort, and the same law should be applied to the one as to the other."

In the case of Illinois Central Railroad Co. v. Jennings, 229 Ill. 608, in which the same question was involved as in this case, the Court said:

> "Appellee's testimony to the effect that the conductor was in charge of the train and was giving orders in connection with the train, and had authority over the train does not tend to show that the conductor had apparent authority to alter the written contract or waive the provision thereof by which appellee was required to ride in the caboose."

We respectfully submit that there is an irreconcilable conflict in the decisions of this Court, the Circuit Court of Appeals, the Supreme Court of Illinois, holding that such stipulations in passes are valid and binding, and the holding of the Supreme Court of Arkansas in this case to the effect that such a stipulation is not a defense.

Respectfully submitted,

EDWARD J. WHITE,
THOMAS B. PRYOR,
Counsel for Petitioner.